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No.

In The

Supreme Court of the United States

October Term, 1997

NEWCO, INC.,

Petitioner,

vs.

THE CESSNA AIRCRAFT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the requirement of de novo review of state law determinations by Federal Courts of Appeal under Salve Regina College v. Russell, 499 U.S. 225 (1991) satisfied when the Court fails to acknowledge the applicable standard of review in its decision, and the decision fails to reference or discuss binding and compelling authority from the state's highest court indicating that the state court would likely reach a different result?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Petitioner, Newco, Inc. is an affiliate of United Payors & United Providers, Inc., a Delaware corporation. The Respondent, The Cessna Aircraft Company, is a subsidiary of Textron, Inc., a Delaware corporation.

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Petitioner, Newco, Inc. respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in Newco, Inc. v. Cessna Aircraft Company, No. 97-1208 (4th Cir. Nov. 12, 1997) is an unpublished per curiam opinion and is reproduced in the appendix to the petition. (App. A). The opinion of the United States District Court for the District of Maryland in Newco, Inc. v. Cessna Aircraft Company, CA-96-2896-AW (D. Md. Jan. 27, 1997) was delivered orally and also is reproduced in the appendix to the petition. (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on November 12, 1997. (App. A). The Court of Appeals denied a timely petition for rehearing on December 8, 1997. (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Rules of Decision Act, 28 U.S.C. §1652 ("State laws as rules of decision") provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

The question presented for resolution by this petition is what does and does not satisfy the minimum standard for de novo review under Salve Regina College v. Russell, 499 U.S. 225 (1991). In order to insure that the Federal Courts of Appeals were honoring their obligation under Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) of applying the substantive law of the forum state when adjudicating state law claims, this Court in Salve Regina directed them to review de novo the state law determinations of district courts. However, the Court of Appeals failed to acknowledge that standard of review in reaching its decision in the instant case. Furthermore, the opinion lacks the careful and comprehensive review of the pertinent legal authorities of the states whose law the Court purported to apply.

In Salve Regina this Court observed that "the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" Id. at 238 citing Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 501 (1984). This maxim is sorely tested in this case, though not so much by deference as indifference. In this instance, the Court of Appeals selectively employed limited principles of Kansas contract law and Maryland tort law in order to avoid its duty under Erie and to instead achieve the outcome it desired. In so doing, the Court of Appeals violated its obligation under 28

U.S.C. §1652 and Erie to decide the issues in this diversity action in the manner that the highest state courts would have decided the issues.

A. Facts Material To The Consideration Of The Question Presented.

On August 30, 1994, Petitioner, Newco, Inc. (hereinafter "Newco"), contracted with Respondent, The Cessna Aircraft Company (hereinafter "Cessna"), to purchase the eighth production model of a new business-class jet aircraft which, at that time, was still in the design stage. The purchase price was $6.295 million and the scheduled delivery date was four years later in May, 1998. In agreeing to enter into the contract, Newco specifically negotiated the right to assign the agreement without restriction; a condition which Newco contends that Cessna accepted. Thus, in defining the term - "Purchaser" - under Cessna's pre-printed form contract, Cessna's sales manager handwrote the following: "Newco, Inc. or assignee". (App. E, p.18a). The contract was then forwarded to Cessna's home office for final approval along with Newco's initial deposit of $125,000.

Two years later, Cessna sent an invoice to Newco for the next installment of $250,000 called for by the terms of the agreement. Upon receiving the bill, Newco wrote Cessna and asked that the agreement be assigned to a corporation known as United Payors & United Providers, Inc. and that a corrected invoice be sent. Cessna refused to honor the requested assignment relying on a "boiler plate" provision in the "General Terms" section of the agreement which purported to restrict the "Purchaser" [defined by the agreement as "Newco, Inc. or assignee"] from assigning the agreement except "to a wholly-owned subsidiary or successor in interest by name change. . . ." (App. E, p.26a, ¶6).

After Cessna informed Newco that it would not agree to the assignment, Newco invoked 2-609 of the Kansas Uniform Commercial Code (UCC)[1], Kan. Stat. Ann. §84-2-609 (1983). Pursuant to that authority, Newco notified Cessna that it wanted written assurances from Cessna that it would honor the unrestricted right of assignment and that it intended to suspend payment of the installment of $250,000 currently due under the most recent invoice until those assurances were received. Alternatively, Newco offered to pay the installment under a "reservation of rights" pending a final resolution of their disagreement pursuant to §1-207 of the Kansas UCC. Kan. Stat. Ann. §84-1-207 (1983).[2] Newco sent five separate written notifications to Cessna in a span of 8 weeks advising that it was invoking its right to suspend performance pending receipt of adequate assurances concerning its right to assign the agreement. Cessna did not provide those assurances, and it also refused Newco's offer to tender its performance under a "reservation of rights". Instead, Cessna unilaterally declared a default based on the purported failure to pay the second installment, and proceeded to resell the production slot for the aircraft.

Newco filed suit in Maryland state court asserting claims for anticipatory repudiation/breach of contract under Kansas law, or alternatively, negligent misrepresentation under Maryland law. Thereafter, Cessna filed a Notice of Removal to the United States District Court for the District of Maryland, Southern Division. In its complaint, Newco initially sought injunctive relief. However, once

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[1] The Kansas UCC was made applicable to the agreement by the express language of section IV, paragraph 9 of the contract. (App. E, p.27a, ¶9).

[2] The parties' contract specified that any installment paid was non-refundable. Tendering performance under a "reservation of rights" would have altered that contract provision.

Cessna announced that it had resold the aircraft, Newco instead claimed damages. Specifically, Newco alleged that Cessna refused to honor the requested assignment and unilaterally declared a breach because the jet aircraft had appreciated in value from $6.295 million to $7.8 million subsequent to the time the parties entered into their contract. Permitting Newco to assign its contract would potentially mean that Cessna would lose a $1.505 million profit margin.

B. The Proceedings Below.

Newco initiated this action on August 23, 1996 by filing a complaint in the Circuit Court for Montgomery County, Maryland alleging anticipatory repudiation/breach of contract under Kansas law and negligent misrepresentation under Maryland law against Cessna. On September 16, 1996, Cessna filed a Notice of Removal in the United States District Court for the District of Maryland, Southern Division, pursuant to 28 U.S.C. §1441. Subject matter jurisdiction was premised upon diversity of citizenship under 28 U.S.C. §1332(a)(1). The value of the contract in dispute is $6.295 million; Newco is a Maryland corporation, and Cessna is a Kansas corporation.

Cessna initially answered the Complaint, then later filed a Motion to Dismiss. In its Motion, Cessna contended that the handwritten term - "or assignee" - was intended to be nothing more than further explication of the pre-printed form language concerning assignment contained in the "boiler plate" portion of the agreement.[3]

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[3] In its brief below, Cessna claimed that the phrase - "or assignee" - was included as part of the definition of "Purchaser" because this additional phrase somehow "clarified" the restrictive assignment language appearing later in the pre-printed text. In discovery responses, however, Cessna

It urged that the two provisions were consistent and unambiguous when considered together. With respect to the negligent misrepresentation claim, Cessna contended that Maryland did not recognize a duty in tort where the relationship between the parties were merely contractual.

Newco responded to Cessna's motion by filing a combined Opposition and Cross-Motion for Partial Summary Judgment on the liability portion of the breach of contract claim under Kansas law. In its pleading Newco argued that handwritten terms in printed agreements are accorded additional evidentiary weight under Kansas law, and accordingly, the mere presence of a handwritten term in this type of agreement required the district court to apply the pertinent contract construction tenets of Kansas case law in order to resolve the question. The application of those rules indisputably compelled a result in favor of Newco. Newco responded to Cessna's argument on the negligent misrepresentation claim by pointing to an April, 1996 Maryland appellate decision which recognized that a tort duty for purposes of a negligent misrepresentation action could arise in a contractual relationship based on a partial or fragmentary disclosure which was misleading because of its incompleteness.

The district court granted Cessna's motion, and denied Newco's motion. Immediately following the court's oral ruling, Cessna made an unopposed oral motion to dismiss its counterclaim seeking to forfeit the deposit of $125,000 Newco paid at the time the contract was signed. The district court also granted that request. A final order disposing of all claims was entered on January 30, 1997. (App. B, pp.7a-10a).

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[3] *Cont'd.* admitted that the subject contract is the only occasion out of more than 100 similar such agreements where it felt constrained to make this "clarification".

On February 7, 1997, Newco noted an appeal to the United States Court of Appeals for the Fourth Circuit in accordance with 28 U.S.C. §§1291 & 1294(1). The issues were fully briefed by the parties and oral argument was heard by a panel of the Court on September 29, 1997. Six weeks later, the Court issued its unpublished per curiam opinion affirming the judgment of the district court. (App. A). In its November 12, 1997 decision, the Court of Appeals found that "although the definition of 'Purchaser' as 'Newco, Inc. or assignee' clearly reflects that the parties contemplated that Newco might assign its rights, nothing in that definition indicates an intention to grant Newco an unrestricted right of assignment." (App. A, pp.4a-5a). With respect to the negligent misrepresentation claim under Maryland law, the Court of Appeals relied on an argument that was not advanced by the parties. The Court held that the claim could not be maintained because such an assertion was "directly contradicted by specific language in the contract itself, [and] Newco's reliance on Cessna's representation was unjustifiable as a matter of law." (App. A., p.6a).

On November 25, 1997, Newco filed a Petition for Rehearing and Suggestion for Rehearing In Banc, or In The Alternative, Motion to Vacate the Opinion and to Certify Questions to the Kansas Supreme Court and to the Maryland Court of Appeals pursuant to FRAP 35 and FRAP 40. In that motion, Newco argued that the Court had not undertaken a de novo review of Kansas contract law as required by Salve Regina College v. Russell, supra. Instead, the Court improperly indulged its own preferences regarding how it believed the case should be decided. Newco also challenged the Court's summary disposition of the tort claim under Maryland law by pointing to a 1982 decision from the Maryland Court of Appeals that expressly reserved ruling on the precise point of law upon which the Court had based its decision. The Court of Appeals denied that Petition and Motion in an order filed December 8, 1997. The Court then filed its mandate in the case on December 16, 1997.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THE HOLDING IN SALVE REGINA COLLEGE v. RUSSELL THEREBY CALLING FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

A. Kansas Precedent Applicable To The Contract Construction Issue Was Ignored By The Court Of Appeals.

This diversity action involved the application of the state law of Kansas to a contract claim, and the state law of Maryland to a claim for negligent misrepresentation. The Court of Appeals opinion violates this Court's holding in Salve Regina College v. Russell, 499 U.S. 225 (1991) because: (1) it fails to undertake a de novo determination of Kansas contract law in construing and interpreting the subject contract; and (2) it attempted to determine a novel issue of Maryland tort law in a manner not "in accordance with the applicable principles for determining state law." Id. at 226-27.

In Salve Regina, this Court held that in a diversity case in which a federal court is applying state law "[t]he obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying Erie require that courts of appeals review the state-law determinations of district courts de novo." 499 U.S. at 239. Here the Court's analysis fails to meet that standard and the concomitant requirement of de novo review of contract interpretation questions mandated by the Kansas Supreme Court. See Weber v. Tillman, 259 Kan. 457, 476, 913 P.2d 84, 86 (1996); Mark Twain Kansas City Bank v. Cates, 248 Kan. 700, 704, 810 P.2d 1154, 1157 (1991). The district court cited no cases under Kansas law to support its decision, and the Court of Appeals referred

to only four citations in one five-sentence paragraph to support the result it reached. Moreover the holding in the two Kansas Supreme Court decisions are inapposite to the Court's ultimate conclusion in the case, and the two Kansas intermediate appellate court decisions are readily distinguishable from the present case.

But all the more noteworthy was the conspicuous absence of other decisions from the Kansas Supreme Court and Kansas Court of Appeals cited by Newco which, as part of a true de novo analysis, should have been discussed and distinguished in order for the decision below to constitute a result in accordance with how the highest applicable state court would decide the issue.

- There was no analysis or discussion of the fact that "[i]t has long been the rule that provisions specially written into a printed form [contract] are to be given particular attention and weight." Hanscome v. W.J. Coppinger, 183 Kan. 623, 626, 331 P.2d 590, 594 (1958).

- There was no analysis of the requirement that the hand-written term "assignee" be given its plain, common and generally understood meaning.[4] Wood River Pipeline Co.

[4] In its opinion, the Court of Appeals found nothing to indicate "an intention to grant Newco an unrestricted right of assignment" (App. A, pp.4a-5a). However, the intent emanates from: (1) the mere presence of the handwritten term; (2) the requirement under Kansas law that "assignee" be given its usual, customary and ordinary meaning; and (3) this Court's prior recognition of "[t]he usual definition of the word assignee in both ordinary and legal usage. See Webster's Third New International Dictionary, 132 (1986) (defining an 'assignee' as 'one to whom a right or property is legally transferred.'); Black's Law Dictionary, 118-119, (6th ed. 1990) (defining an 'assignee' as '[a] person to whom an assignment is made' and 'an assignment' as '[t]he act of transferring to another all or part of one's property, interest, or rights . . . .'" Holywell Corp. v. Smith, 503 U.S. 47,

v. Willbros Energy Services, Co., 241 Kan. 580, 723 P.2d 866 (1987).

- There was no analysis of the requirement that "[w]here part of a contract is printed and part of a contract is handwritten or typed by filling in blanks in a printed form, handwritten or typed words will control over the printed part." (emphasis supplied) Desbien v. Penokee Farmers Union Co-op. Ass'n, 220 Kan. 358, 363, 552 P.2d 917, 923 (1976); see also Hickey v. Dirks, 156 Kan. 326, 133 P.2d 107 (1943).

- There was no analysis of Kan. Stat. Ann. §84-3-118 (1983) which expressly provides that "handwritten terms control typewritten and printed terms."

- There was no analysis of whether the handwritten term should be regarded as a specific versus a general term when compared to the printed term. Smith v. Russ, 184 Kan. 773, 339 P.2d 286 (1959). This distinction was important because if there is uncertainty between the general provisions of a contract and particular provisions written into the contract, preference is given to the latter for the purpose of ascertaining the intent of the parties. Geier v. Eagle-Cherokee Coal Mining Co., 181 Kan. 567, 313 P.2d 731, 736 (1957); Haynes Hardware Co. v. Western Casualty & Surety Co., 156 Kan. 356, 362, 133 P.2d 574, 579 (1943). The Kansas Supreme Court would likely have treated the handwritten term or interlineation as the specific provision with the "reasonable inference

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[4] *Cont'd.* 53 (1992). Nothing in the foregoing definition by this Court suggests any inherent limitation on the right of assignment when the term "assignee" is used.

[being] that the specific provision expresses more exactly what the parties intended rather than broad or general clauses which do not necessarily indicate that the parties had the particular matter in thought." Smith v. Russ, 184 Kan. 773, 339 P.2d 286 (1959).

- There was no analysis concerning the exception to the general rule of Kansas contract construction law that requires all provisions to be read together, and not in isolation. The exception holds that the general rule "...does not require that dissimilar contract provisions be given the same interpretation." D.R. Lauck Oil Company, Inc. v. Breitenbach, 20 Kan. App. 2d 897, 881, 893 P.2d 286, 290 (1995). Nothing could be more dissimilar than a hand-written term when compared to a preprinted contract provision on the same subject, especially considering the greater weight and deference accorded the handwritten term under Kansas law.

- Finally, there was no analysis of the fact that Newco, Inc. or assignee is a "defined term" for Purchaser under the express terms of the contract, and whether substituting the definition in the later restrictive assignment provision gives rise to uncertainty or a doubtful meaning.[5] To find otherwise, the Court would have to conclude that when read together the handwritten contract term inserted into the agreement and the later pre-printed language using the

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[5] Inserting "Newco, Inc. or assignee" in place of "Purchaser" in section IV, paragraph 6 of the contract, causes the agreement to read as follows: "This Agreement, including the rights of Newco, Inc. or assignee hereunder, may not be assigned by Newco, Inc. or assignee except to a wholly owned-subsidiary, successor in interest by name change or otherwise and then only upon the prior written consent of the seller."

> defined term - "Newco, Inc. or assignee" - "express[es] clearly and positively, the true intent of the parties." Hall v. Mullen, 234 Kan.1031, 678 P.2d 169 (1984).

In sum, the failure to reference the above authorities in its opinion as well as its failure to even acknowledge the applicable standard of review cannot be reconciled with the Court of Appeal's obligation to interpret state law rather than fashioning it.

B. The Kansas Authorities Relied On By The Court of Appeals Do Not Support Its Decision On The Contract Issue.

On closer scrutiny, the citations relied on by the Court of Appeals do not support the result reached on the contract interpretation issue. The Court cited Simon v. National Farmers' Org., Inc., 250 Kan 676, 829 P.2d 884 (1992) for the proposition that "[a]mbiguity in a written contract does not appear until the application of pertinent rules of interpretation to the face of the instrument leaves it generally uncertain which one of two or more meanings is the proper meaning." (emphasis supplied) (App. A, p.4a). This language acknowledges that divergent meanings can be urged by the parties and that the pertinent rules of interpretation under Kansas law can be applied prior to making a finding that an ambiguity exists and the court receiving parol evidence to resolve the ambiguity. Yet, the Court of Appeals next proceeded to disavow the applicability of those rules of interpretation to the matter before it.

The decision in Desbien v. Penokee Farmers Union Coop. Ass'n, 228 Kan. 358, 552 P.2d 917 (1976) was cited for the proposition that where "the provisions of a written instrument are clear and unambiguous, there is no occasion for applying rules of construction." (App. A, p.4a). But, in Desbien the Kansas Supreme Court found an uncertain and ambiguous meaning based on a handwritten term inserted into a printed form contract observing that

"handwritten terms control typewritten or printed terms". Id. at 363, 552 P.2d at 923. That is precisely the situation presented by this case, and for the Court of Appeals to find that the Kansas Supreme Court would have disregarded the significance of the handwritten term "or assignee" is simply not plausible.

The Court's own comment to the effect that the handwritten term "clearly reflects that the parties contemplated that Newco might assign its rights" is an acknowledgment that the significance of the handwritten term cannot be ignored or minimized. Contrary to the Court's treatment of the phrase in its opinion, Kansas law requires that this term be given paramount importance. The added weight and deference accorded the handwritten term creates "uncertainty or doubt" as to the meaning, which in turn triggers the application of the pertinent rules of construction to the contract. Thereafter, if the application of the pertinent rules still does not resolve the uncertainty then, and only then, is an ambiguity deemed to exist requiring the admission of extrinsic parol evidence. Simon v. Nat'l Farmers Org., Inc., supra.

The bar on extrinsic evidence to contradict or construe an unambiguous agreement referenced in TMG Lake Ins. Co. v. Ashner, 21 Kan. App.2d 234, 898 P.2d 1145 (1995) which the Court also cited, resulted from the parties joint agreement that the guaranty at issue in this case was unambiguous. The case involved a lender's attempt to expand the guarantor's liability by implication which the court declined to do based on issues of guaranty law and the parties stipulation that the guaranty instrument was unambiguous. Contrast

that intermediate appellate court ruling with the holding of the Kansas Supreme Court in Wood River Pipeline Co. v. Willbros Energy Services, Co., 241 Kan. 580, 723 P.2d 866 (1987).[6]

In Wood River, both parties to a pipeline construction agreement argued a different interpretation of the same provision regarding indemnification. 241 Kan. at 582, 738 P.2d at 869. The trial court found that the contract was clear and unambiguous and did not apply the rules of contract construction. However, on appeal, the Kansas Supreme Court noted that "[i]n determining whether the contract in question is ambiguous, we are not limited to reviewing the district court's conclusions. Rather we have the same opportunity to consider and evaluate the evidence as did the district court." [citation omitted] Id. at 586, 738 P.2d at 871. The Court then proceeded to apply the rules of contract construction and affirmed the lower court's decision that the contract was clear and unambiguous. The Wood River Court's use of the rules of contract construction is consistent with the holdings of Weber v. Tillman, supra, and Desbien v. Penokee Farmers Union Co-Op Ass'n., supra, and is inconsistent with this Court's conclusion that the rules are inapplicable in the present situation.

In divining and applying the law in diversity of citizenship cases, a federal court functions as a proxy for the entire state court system, and therefore must apply the substantive law that it conscientiously believes would have been applied in the state court

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[6] The final authority cited by the Court of Appeals, Hall v. JFW, Inc., 20 Kan. App. 2d 845, 893 P.2d 837 (1995), involved the rules of construction for oil and gas leases, a sub-specialty of Kansas contract law. The issue there concerned whether a lessee had timely commenced operations for drilling a well and turned on the question of what constitutes commencement of drilling operations under established Kansas case law.

system. Newco did not receive that conscientious deliberation in this case.

C. The Court Of Appeals Improperly Expounded On An Unresolved Question Of Maryland Tort Law.

After concluding that the contract was unambiguous, the Court of Appeals then proceeded to hold that the negligent misrepresentation claim could not be maintained because such an assertion was "directly contradicted by specific language in the contract itself." (App. A, p.6a). The Court reasoned that Newco's reliance on Cessna's representation was unjustifiable as a matter of law because "one may not reasonably rely upon an oral statement when he has in his possession a contrary statement in writing." The Court reached its conclusion without the benefit of the question being briefed or argued by the parties.

In support of this conclusion, the Court cited to two decisions by the Fourth Circuit and one from the Maryland Court of Appeals. However, what the Court of Appeals regarded as an issue of "justifiable reliance" is in actuality a question involving the effect of the parol evidence rule on a tort action for negligent misrepresentation when a plaintiff simultaneously pursues both a tort and contract action based on the same set of facts. And, the Maryland Court of Appeals has not previously ruled on this precise question and, in fact, has expressly reserved ruling on the question.

In Weisman v. Conners, 312 Md. 428, 540 A.2d 783 (1988) the Maryland Court of Appeals discussed whether four representations which were grounded in the terms of a written employment contract could serve as a basis for an action in negligent misrepresentation. The court found that there was insufficient evidence for the representations to go to the jury, and therefore did not reach the separate issue of whether or not the presence of those

representations in a written contract precluded a tort action for negligent misrepresentation. In so holding, the court observed as follows:

> We nevertheless note that the availability of both tort and contract actions for the same kind of harm has engendered considerable confusion and complexity. See Prosser and Keaton on the Law of Torts §92 at 655 (5th ed. 1984). One thorny question concerns the effect that the parol evidence rule has on tort actions when the tort and contract actions are based on the same set of facts.
>
> In Creamer v. Helferstay, 294 Md. 107, 448 A.2d 332 (1982), we reserved judgment on whether the parol evidence rule precluded a tort action based on a negligent misrepresentation that contradicted a term of the contract between the parties to the tort suit. 294 Md. at 119, n.13, 448 A.2d 332. We there affirmed the related principle that in a suit for recission of a contract the parol evidence rule precludes the granting of relief for unintentional representations preceding the contract which conflict with the terms of the contract. (emphasis supplied).

Id. at 456 n.4, 540 A.2d at 797 n.4.

The court went on to take notice of the Fourth Circuit decision in Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623 (4th Cir. 1977) without expressing either approval or disapproval of the result reached in that case. The Call Carl decision was one of three authorities cited by the Court of Appeals in affirming dismissal of the negligent misrepresentation claim. The other two cases cited by the Court were inapposite to the issue. (App. A, p.6a).

The decision in Foremost Guarantee Corp. v. Meritor Savings Bank (App. A, p.6a) dealt with a suit for recission of a contract rather than breach of contract claim. The result in that case mirrors the decision of the Maryland Court of Appeals in Creamer v. Helferstay, supra which also involved a recission claim. As discussed above, the Maryland Court of Appeals in Creamer v. Helferstay, supra, declined to address the question of how the parol evidence rule impacted on a parallel tort claim for negligent misrepresentation. The James v. Goldberg (App. A, p.6a) decision from the Maryland Court of Appeals involved a fraud claim and not a negligent misrepresentation claim. It also predated recognition of the modern claim of negligent misrepresentation by Maryland which occurred in Martens Chevrolet, Inc. v. Seney [7] in 1982.

The Court of Appeals prediction of how the Maryland Court of Appeals might rule upon the issue conflicts with the well recognized doctrine of federal courts refraining from weighing policies and formulating state substantive law on a subject. See, e.g., Burris Chemical Inc. v. U.S.X. Corp., 10 F.3d 243, 247 (4th Cir. 1993). Even assuming that it was appropriate for the Court of Appeals to attempt a prediction as to how the Maryland Court of Appeals would rule on the issue, its analysis was not done "in accordance with the applicable principles for determining state law." Salve Regina College v. Russell, supra. In formulating this change in Maryland state law the Court of Appeals failed to consider all available legal resources such as treatises, law review commentaries, relevant state precedents, analogous decisions, considered dicta, scholarly work such as restatements of the law, decisions from other jurisdiction whose doctrinal approach is substantially the same and the "majority rule" as adopted by other states. See McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 662-63 (3rd Cir.) cert. denied

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[7] 292 Md. 328, 439 A.2d 534 (1982).

449 U.S. 976 (1980). The portion of the Court of Appeal's opinion directed to the tort claim of negligent misrepresentation under Maryland law lacks any reliable data tending to convincingly show how the Maryland Court of Appeals would decide the issue.

CONCLUSION

As this Court observed in Salve Regina College, supra, independent appellate review necessarily entails a careful consideration of the legal analysis on the state law issues. Appellate indifference to determinations of state law is as much inconsistent with the principles underlying this Court's decision in Erie R.R. Co. v. Tompkins as is appellant deference to a lower court's legal analysis. The Court of Appeals decision personifies the denial of a litigant's access to meaningful review of state law claims under the federal court system. Such a lack of meaningful review "create[s] a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." Salve Regina College, supra. This type of result cannot be reconciled with the commands of Erie and can only be corrected by this Court's intervention.

For the reasons set forth above, Newco respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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